# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

## No. 25

GUS POLITES,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR PETITIONER

GOODMAN, CROCKETT, EDEN & ROBB
*Attorneys for Petitioner*
3220 Cadillac Tower
Detroit 26, Michigan
Woodward 3-6288

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### Opinions Below

No printed opinion was filed by the Court of Appeals. Copy of the Court's order of affirmance appears on page 207 of the Record. The opinion of the District Court appears to be unreported. It is reproduced in the Record (Tr. 203).

### Jurisdiction

The order of affirmance by the Court of Appeals was entered on October 16, 1959. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U.S.C.A.

Sec. 1254. The Petition for Writ of Certiorari was granted on February 23, 1960.

## Questions Presented

### I.

Has Petitioner been deprived of his citizenship without due process of law by reason of the District Court's erroneous interpretation and application of the denaturalization law (8 U.S.C., Sec. 738(a)), where, as here, the proofs adduced by the Government and the findings made by the Trial Court, failed to meet the standards for denaturalization as subsequently clarified in this Court's decisions in *Nowak* v. *United States* and *Maisenberg* v. *United States*, 356 U.S. 660 and 670, 78 S. Ct. 955 and 960?

### II.

Is the remedy provided in Rule 60(b) of the Federal Rules of Civil Procedure available to set aside the judgment of denaturalization in this case?

## Statutes Involved

The Nationality Act of 1906 (34 Stat. 596, as amended) 8 U.S.C. (1934 ed.) 364 provided as follows:

Section 4, par. 4:

> "No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3)

during all the period referred to in this subdivision he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. * * * "

Section 7.

"No person who disbelieves in or is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such *disbelief in or opposition to organized government* * * * shall be naturalized or be made a citizen of the United States." (Emphasis added.)

Section 15.

"It shall be the duty of the United States district attorneys for the respective districts . . . upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. * * * "

The above Nationality Act of June 29, 1906 was superseded by the Nationality Act of 1940, 54 Stat. 1137 (Title 8, U.S.C. (1940 ed.), Sec. 700 *et seq.*). The pertinent portions of the 1940 Act are the following:

Section 705.

"No person shall hereafter be naturalized as a citizen of the United States—

(a) Who advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that advises, advocates, or teaches opposition to all organized government; or

(b) Who believes in, advises, advocates or teaches, or who is a member of or affiliated with any organization, association, society or group that believes in, advises, advocates, or teaches—(1) *the overthrow by force or violence of the Government of the United States,* or of all forms of law." (Emphasis added.)

* * * * * * *

"The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten (10) years immediately preceding the filing of the petition for naturalization is, or has been, found to be within any of the clauses enumerated in this section, notwithstanding that at the time petition is filed, he may not be included in such classes."

* * * * * * *

Section 707(a).

"No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, * * * during all the periods (five (5) years) referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

Section 738 (a) provided essentially the same provision for cancellation of citizenship as that contained in Section 15 of the 1906 Act (*supra,* p. 3).

Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure provides in pertinent part:

"(b) On motion and upon such terms as are just, the Court may relieve a party * * * from a final judgment * * * for the following reasons: * * * (5) * * * it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

## Statement of the Case

Petitioner, 60 years of age, is a native of Greece who has lived in this country continuously since he was sixteen (16) years old (Tr. 15).* He is married to a native born American citizen and they have two children and two grandchildren. He has no criminal record. Until approximately a year ago, he was employed as a truck salesman of food products. Failing health now prevents his employment.

*Petitioner's Naturalization*

On April 6, 1942, Petitioner was naturalized by the Federal District Court at Detroit. At the time of his naturalization the Nationality Act of 1940 (*supra*, pp. 3-4) was in effect. Sections 705 and 707 of that Act made an alien ineligible for naturalization if within ten (10) years preceding the filing of his petition for naturalization, he had been a member of an organization advocating (1) opposition to organized government or (2) the violent overthrow of the Government. A petitioner for naturalization also was required to affirm his "attachment to the principles of the Constitution of the United States" and be a person of good moral character.

The form of Preliminary Petition for Naturalization (Govt. Exh. 2, Tr. 15-16) executed by Petitioner in 1940 contained the following as Question No. 28:

* ("Tr —" refers to the Transcript in this Court.)

> "Are you a believer in anarchy? * * * Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?"

Petitioner answered "no" to both parts of this question.

The form of Petition for Naturalization (Govt. Exh. 1, Tr. 13), executed by Petitioner stated:

> "(15), I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition, an *anarchist;* nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor *a disbeliever in or opposed to organized government;* nor a member of or affiliated with any organization or body of persons teaching *disbelief in or opposition to or opposition to organized government.*" (Emphasis supplied.)

*Petitioner's Denaturalization Proceedings*

Ten years after Petitioner's naturalization and on June 16, 1952, the Government filed its Complaint to Cancel Citizenship (Tr. 1) in the Court below, seeking revocation of Petitioner's naturalization upon the grounds of fraud and illegal procurement. (Section 338(a) of the Nationality Act of 1940 (8 U.S.C. Sec. 738(a).) It charged that Petitioner's citizenship had been obtained by fraud in that he had been a member of the Communist Party from 1933 to 1941 and had concealed such membership at the time of his naturalization. It further charged that naturalization was illegally procured because Petitioner had been a member of the Communist Party within the ten (10) years preceding the filing of his petition for naturalization; that the Communist Party, during the period of his membership, taught and advocated the violent overthrow of the Gov-

ernment of the United States; that he "was familiar with and approved of the activities, aims, and teachings of the Communist Party"; and that he was, therefore, ineligible for citizenship and lacking in attachment to the Constitution.

Additionally, the Complaint alleged that in 1940, and prior to the filing of his petition for naturalization, Petitioner executed and filed an Alien Registration Form in which he falsely denied membership or activity in any "clubs, organizations or societies" and falsely stated that "within the past five (5) years he had not been affiliated with or active in any organizations devoted to furthering the political activities or public policy of any foreign government."

The Government's summary of the proofs upon which it relied to establish these charges, was filed at the request of the Trial Court (Tr. 199-203). Petitioner's summary of the entire testimony at the denaturalization trial (Tr. 193-197) was filed with his Rule 60(b) motion. A more detailed discussion of the evidence is contained in our Argument (*infra*, pp. 16-20).

Petitioner, called by the Government as a witness, testified that he was a member of the Communist Party from 1931 to 1938 but held no Party office (Tr. 38).

The Naturalization Examiner testified that at the time he interviewed Petitioner he did not ask Petitioner if he was or had been a member of the Communist Party (Trial Tr. pp. 476-484).

Other witnesses, former members of the Party, were called to identify Party publications and to testify concerning Petitioner's activities in the Party and related organizations. Their testimony is sufficiently set forth in the argument (*infra*, pp. 16-20).

The substance of Petitioner's defense was that *he* did not know the Communist Party as an organization advocating anarchy or the violent overthrow of the Government. He admittedly had been a rank and file member of the Communist Party during the depression years from 1931 to 1938 (Tr. 28), but he held no "position of responsibility" in the Party (Tr. 37); he read only "the papers and small pamphlets" and never had read any Party literature that advocated overthrow of the Government (Tr. 91-93). He personally never engaged in such advocacy (Tr. 95-97).

He further contended that in his naturalization proceeding he was never asked concerning the Communist Party nor membership in the Party and he did not understand any of the questions put to him, in either his alien registration form or his naturalization forms, as referring to the Party (Tr. 96-101). He left the Party in 1938 when its convention ruled aliens ineligible for membership (Tr. 101).

The Government contended (Tr. 23-24), and the Trial Court held (Tr. 176), that Petitioner's knowledge as to the character of the Party's teaching and advocacy was of no moment on the charge of illegality; that, assuming the proofs established illegal advocacy by the Party, his admission of membership in the Party made him a member of a class of persons ineligible for citizenship and, hence, the grant of citizenship to him was illegal. The Government further contended (Tr. 21-22), and the Trial Court held, that the charge of fraud was established by the proof that Petitioner did not disclose his prior Party membership in answering Question No. 28 on his Preliminary Petition and in his replies in his Alien Registration form (*supra*).

Accordingly, the opinion of the District Court cancelling Petitioner's citizenship held that Petitioner had obtained citizenship both fraudulently and illegally (Tr. 175).

Judgment of denaturalization was entered on August 20, 1953. Notice of Appeal was filed and the appeal was docketed in the Court of Appeals for the Sixth Circuit on October 15, 1953.

At the time of Petitioner's appeal, the Court of Appeals for the Sixth Circuit already had before it three (3) similar denaturalization appeals from the same District Court. These three (3) cases were *Sweet* v. *United States*, 106 F. Supp. 634; *Charnowcla* v. *United States*, 109 F. Supp. 810 and *Chomiak* v. *United States*, 108 F. Supp. 527. Petitioner's counsel appeared and argued for the Appellant in each of them.

After Petitioner's appeal had been filed with the Court of Appeals but before his brief was due, the Court of Appeals entered judgments of affirmance in each of the above three (3) cases (211 F. 2d 118). The single *per curiam* opinion reiterated and approved the District Court's conclusion in each case but was silent on the issue of the appellant's knowledge in each case—the prime issue of the defense.

Petitions for Certiorari were filed in each of these three (3) cases and among the questions presented in each was the absence of any proof or finding that the appellant had knowledge of the claimed subversive character of the organization. (October Term, 1954 Nos. 73, 74 and 75.)

Following the filing of these Petitions for Certiorari, counsel for Petitioner here obtained from the Court of Appeals the following order extending the time for filing briefs in his appeal—

> "to thirty (30) days from the date of final disposition by the Supreme Court of the United States of the Petitions for Certiorari (in the above three (3) cases)."

After the denial of certiorari by this Court in each of these three (3) cases (348 U.S. 817), counsel for Petitioner here stipulated for dismissal of Petitioner's appeal with prejudice.

Thereafter, and on January 31, 1955, deportation proceedings were instituted against Petitioner, culminating in a final order of the Board of Immigration Appeals, entered on January 6, 1956, and directing Petitioner's deportation to his native Greece because of his admitted prior membership in the Communist Party. (See Sec. 241(a)(6)(c) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1251 (a)(6)(C).)

*The Present Proceeding*

On May 6, 1958, this Court decided *Nowak* v. *United States* and *Maisenberg* v. *United States*, 356 U.S. 660 and 670, 78 S. Ct. 955 and 960, reversing judgments of denaturalization theretofore rendered in each of these cases by the same District Judge who had heard and determined Petitioner's denaturalization.

Relying upon *Nowak* and *Maisenberg*, Petitioner, on August 6, 1958, filed his Motion under Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure (Tr. 188) to vacate the denaturalization judgment in his case.

The District Court denied the motion for two reasons: The Court apparently believed (Tr. 203) that Petitioner's case was distinguishable from *Nowak* and *Maisenberg* because the organizational proscription in the 1940 naturalization statute, under which Petitioner was naturalized (*supra*, p. 3) was different in language from the 1906 Act (*supra*, p. 2), which was before this Court, in *Nowak* and *Maisenberg*. And second, the District Court believed that in any event, it was precluded by this Court's decision in *Ackermann* v. *United States*, 340 U.S. 193 and the decision

of the Sixth Circuit in *Berryhill v. United States*, 199 F. 2d 217, from granting relief under Rule 60(b) based upon "a change in the judicial view of the applicable law." The reluctance of the District Court in reaching this decision is apparent from the following concluding portion of its opinion (Tr. 206).

> "Ordinarily we would have granted petitioner's prayer, particularly under subsections (b)(5) of Rule 60, authorizing us to do so, if it is no longer equitable that the judgment should have prospective application. But in our opinion, our Court of Appeals specifically eliminates such holding, where the only reason for abandoning the appeal was because of the then status of the law under the 'controlling decisions'."

## ARGUMENT

### I.

### Was the Cancellation of Petitioner's Citizenship Effected Under Circumstances Which Offend a Sense of Justice and to an Extent That Due Process Requires That Such Cancellation Be Set Aside?

1. Citizenship is rightly regarded as the most cherished possession of Americans. Many judicial injustices which otherwise might be tolerated in the interest of orderliness or an end to litigation, require a different approach and a different result where this most cherished possession is at stake.

Petitioner here, not only has been deprived of his citizenship, but he is imminently faced with banishment from the place he has called home for the past thirty-four (34) years and permanent separation from his family. His deportation can be justified under law only in the event the cancellation of his citizenship was lawful.

In *Rochim* v. *California*, 342 U.S. 165, 72 S. Ct. 205, this Court again formulated the basic tenet of substantive "due process" (at p. 173):

> . . . Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a "sense of justice." . . .

If, as this Court has rightfully observed, "justice must satisfy the appearance of justice" (*Offutt* v. *United States*, 348 U.S. 11, 14) then surely there is a denial of justice where, as here, the same District Judge upon identical charges and applying what was claimed by the Government to be identical legal principles to virtually identical proofs, arrives at identical judgments, one of which is later held by this Court to be erroneous and the other is permitted to stand and have prospective effect. Even if the unreversed judgment retains its presumed validity, there is no justification for allowing it to retain its prospective effect—especially where to do so subjects the losing party to the dire consequences here presented without any legally recognizable advantage to the successful party.

*Nowak* and *Maisenberg* were the first judgments of denaturalization, based upon a finding of Communist Party membership, to reach this Court following the 1943 decision in *Schneiderman* v. *United States*, 320 U.S. 118. In the intervening fifteen (15) years the policy of the Immigration Service and prevailing judicial decisions in this Court had resulted in a gradual whittling away by the lower courts of both the expressed and the implied majority holding in *Schneiderman* to the point, where, by 1954 attorneys for the Department of Justice, and the Immigration Service, relying upon language in *Dennis* v. *United States*, 341 U.S. 494, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 590, 592,

*Carlson* v. *Landon*, 342 U.S. 524, 535 and *American Communications* v. *Douds*, 339 U.S. 382, confidently argued that:

> "In view of the strong dissent in the *Schneiderman* case (see dissent by C. J. Stone, with appendix of citations from Communist Party literature containing statements concerning force and violence, 320 U.S. 170-207), and statements by the Supreme Court since the decision in that case regarding the revolutionary character of the Communist Party, it is submitted that the *Schneiderman* decision today merely is authority for the rule that the Government in a denaturalization proceeding has the burden of proving its case by clear, unequivocal and convincing evidence." (Gov. Br. in Court of Appeals in *Chomiak* case, *supra*, p. 9.)

We do not undertake to catalogue here the long list of decisions in the lower Courts which accepted and followed the Government's restricted interpretation of *Schneiderman* prior to *Nowak;* and which held that mere membership in the Communist Party within the ten (10) year period made one ineligible for citizenship, regardless of his knowledge of the Party's alleged advocacy. Certainly, this was the rule in the Sixth Circuit (*Chomiak* v. *U. S., supra*).

Our immediate concern here, however, is with the controlling significance of *Nowak* for purposes of demonstrating that in the context of the facts in Petitioner's case the District Court's cancellation of his citizenship not only was erroneous but it amounted to a denial of due process. Our presentation of this issue necessarily involves a comparison of Petitioner's case and the facts, issues and the law in *Nowak*. Accordingly, we rely in large part upon the legal arguments presented to this Court in the Brief for Petitioner in *Nowak* and the pertinent portions of the

argument there presented are herein incorporated by reference.

2. The complaint and the "affidavit of good cause" filed in Petitioner's case and in *Nowak* are practically indistinguishable except for names, times and places. The complaint in Petitioner's denaturalization proceeding (Tr. 1-3) charges him with having made the identical misrepresentations charged in the *Nowak* complaint (see pp. 117-118 of Petitioner's Brief in *Nowak* in this Court), notwithstanding *Nowak* was naturalized under the 1906 Act whereas the 1940 Act was applicable in Petitioner's case. As we have seen, the 1906 Act refers to persons and organizations teaching *disbelief in organized government,* while the 1940 Act extended the proscription to persons who teach and advocate *the violent overthrow of the Government.* The distinction in the reach of these two statutes is pointed up in Petitioner's Brief in *Nowak,* pages 28-37.

The Government, of course, might have charged in its Complaint that the Petitioner made a misrepresentation based upon sub-section 705(b) of the 1940 Act (violent overthrow of the Government) rather than 705(a) (belief in anarchy) (*supra,* p. 4); thus invoking the specific amendatory language contained in the 1940 Act. But it did not do this; instead, it elected to charge Petitioner in the language of the 1906 Act. Thus, the claimed basis for the charge of illegality in both *Polites* and *Nowak* cases is the same and follows the literal language of the 1906 Act. Therefore, the Trial Court in seeking to distinguish Petitioner's case on the basis of the amended language of the 1940 Act is doing precisely what this Court said in *Schneiderman* (320 U.S. at 160) could not be done; it is going "outside the scope of the complaint" and this amounts to a "conviction upon a charge not made." *De-Jonge v. Oregon,* 299 U.S. 353, 362.

The basis for the Government's claim—and the Trial Court's finding—of fraud in Petitioner's case also was the same as in *Nowak*. In each of these cases, *Polites* and *Nowak*, the Government conceded or the Trial Court found that the applicant was never specifically asked concerning his alleged Communist Party membership; hence the charge of fraud in both cases was grounded upon the applicant's negative answer to Question No. 28 which was the same in each case (Tr. 15-16; and pp. 129-130 of Petitioner's Brief in *Nowak*, in this Court).

3. The proofs adduced by the Government to support its complaint against Petitioner likewise followed the identical pattern in form and content as in *Nowak*. In each case, there was introduced by stipulation a list of the same fourteen (14) Marxist-Leninist books or pamphlets relied upon by the Government as showing the Party's advocacy of violence. (See Tr. 178-179 and also Petitioner's Brief in *Nowak*, pp. 147-148.) Neither in this case nor in *Nowak* was there any evidence that the defendant had read or was familiar in any way with these writings or the Government's excerpts from these books (Tr. 92). Additionally, in each case reliance was had by the Government upon the testimony of disgruntled former Party members or paid informers concerning what they heard or observed concerning the Party and its advocacy at places and times when the defendant may not have been present (Tr. 141, 199-200). And in each case the principal Government witness was one, Nowell, and the period covered was the Thirties.

The nature and the insufficiency of such testimony in the *Nowak* case is apparent from the opinion of this Court in that case (356 U.S. at pp. 665-667) and need not be repeated here. It is enough to note here that after a review of all of the above evidence in *Nowak* this Court said (p. 665):

". . . But even assuming that the evidence of the illegal advocacy of the Party was sufficient . . . we nevertheless hold that the Government cannot prevail on this record. For we are of the opinion that it has not been established that Nowak knew of the Party's illegal advocacy."

When the evidence in *Nowak* as it relates to the question of the petitioner's knowledge, is compared with the testimony here, as set forth in the Government's own summary (Tr. 199-203), it is obvious that the Government's case against this Petitioner falls far short of the Government's effort in *Nowak*. For example, those portions of the Government's Summary (Tr. 201) which purport to set forth the totality of its proof of Petitioner's advocacy or his knowledge of the claimed illegal teaching and advocacy by the Party, ascribes only the following to this Petitioner:

The witness Syrakis testified (Tr. 124-127) concerning the Petitioner as follows:

"Q. Yes. And what were the words he used there?

A. He used the words to—how to organize the Greek Workers, and all the workers of the land, to better themselves and extend the existence of the class struggle, and gradually strengthen themselves and gradually overthrow the present system by force and violence.

Q. By 'present system', what do you mean?

(fol. 168) A. The—

Mr. Goodman (Interposing): Just a moment.

A. The existing government of the United States.

* * * * * * *

Q. Well, did Mr.—what were the exact words Mr. Polites used?

A. The exact words, was the strengthening of the working class, to fight, to cause trouble and gradually strengthen themselves in order to overthrow the present government by force and violence.

Q. Did Mr. Polites ever say how he or the Party planned to do this?

A. Yes.

Q. You were present?

A. Yes.

Q. What did he say?

. . . . . .

Q. What was his statement? What did he say?

A. He said the way to organize, agitate—agitate the workers, organize them, in order to follow up when the time comes to overthrow the government by force and violence.

. . . . . .

Q. Did he ever say in your presence the methods that he was going to use?

A. Well, the only method he said was by force. He said (fol. 172) that we, the workers, would never be able to get in the Government by vote.

Mr. Goodman: What is that?

The Court: By vote. He says it wouldn't be possible to arrive at the desired goal, or something to that effect, by vote. It would have to be by force and violence. I think that is what he said; if I am wrong, correct me.

*By Mr. Hamborsky:*

Q. That is what you said, wasn't it?

A. Yes.

The Court: He said 'Yes'.

*By Mr. Hamborsky:*

Q. Did he ever—that is, Mr. Polites, did he ever mention in your presence how he would organize these people, either the Communist Party members or the citizens?

A. Well, the Communist Party members has to be—had to be the leaders, the directors, among the public, to organize the different groups, the societies and unions and different other mass organizations, in order to direct them. The Party members was supposed to be the directors or the leaders of that movement."

* * * * * * * * *

The witness Nowell testified (Tr. 165-166):

"Q. Now, were you ever present at a meeting with the defendant Guss Polites when he spoke as a functionary of the Communist Party?

A. Yes, I have been.

Q. Where and when?

A. It was at the Greek Workers Club on several occasions during 1933 and '34.

Q. What did he say?

A. Well, I was representative from the District Bureau, and the subject largely was that of Marxism-Leninism theory, that is, to spur on our educational program. Also local issues were taken up and the application of Leninism to the concrete situation. My best recollection is that Polites took the floor and spoke as to the objectives of the program of the Communist Party, mentioning local campaigns and their progress at the time.

Mr. Goodman: I can't hear this witness.

(fol. 265) The Court: Mentioning what?

A. Local campaigns that were in progress at the time. Among other things, in detail—

*By Mr. Hamborsky* (Interposing):

Q. Speak up.

The Court: Keep your voice up, please. Does that advocate the overthrow of this government by force and violence?

Mr. Goodman: Did he?

A. He has, in speeches, advocated the overthrow of the government by force and violence, during my presence.

Mr. Goodman: Yes.

The Court: I didn't hear what he said.

Mr. Goodman: I didn't hear the last part, either.

The Court: He says he has advocated —

Mr. Goodman (Interposing): Read the last answer, please.

(Last answer read by the Reporter.)

A. Better 'during'—'in my presence'. Also continuing my answer along this line, I, as Educational Director, was charged with evaluating the political and ideological development of Communist Party members, to select and train them in the ideology and political policies of the Communist Party, and on many occasions, I have talked in groups and privately with Polites with respect to his political (fol. 266) beliefs, his adherence to the line and program and ultimate objectives of the Communist Party and Communist International, and he was always fully in support and an advocate of the firm objectives of the Communist Party of the United States.

*By Mr. Hamborsky:*

Q. Now, do you know if any time during this period the defendant, Guss Polites was the director for Agitation and Propaganda?

A. I am not so sure. I am not sure I know he was. I believe he was during the latter part of 1934 or first part of 1935. He was some functionary in his unit. I can't be sure just what it was."

Here we have, then, the total of the alleged illegal advocacy attributed by any witness to this Petitioner or to anyone else in Petitioner's presence. These quotations and Petitioner's insignificant role in the Party should be compared with the quotations attributed to *Nowak* and referred to in the opinion of this Court in *Nowak*, page 667 (Note 4). It is clear, we think, that they fail to show either illegal advocacy or knowledge of such illegal advocacy by this Petitioner. And, therefore, from a factual comparison of the charges and the proofs in *Nowak* and in Petitioner's case, it follows that the Government failed to prove its case for cancellation of Petitioner's citizenship.

4. The opinion of the District Court, in denying Petitioner's motion under Rule 60(b) (Tr. 203), emphasizes the difference in the language of the belief sections of the 1906 Act and the 1940 Act. The opinion suggests (Tr. 205), that knowledge by the applicant of the Party's illegal advocacy is now required to cancel citizenship obtained under the 1906 Act, but is not required where citizenship was obtained under the 1940 Act. The reasoning appears to be that the 1940 Act contained new language which was not before this Court and hence, was not interpreted by this Court in *Nowak*. This, we submit, is a restricted reading of this Court's decision in *Nowak*.

As we have seen (*supra*, p. 2), the 1906 Act expressly barred citizenship to *disbelievers in organized government:*

and the 1940 Act added to this proscription an expressed reference to persons and organizations who *teach and advocate the violent overthrow of the Government* (*supra*, p. 4). What is important, however, is not the difference in the language of the two statutes. Rather, the controlling issue is whether the 1940 amendment was intended by Congress to eliminate the requirement of knowledge.

The legislative background for both Acts is discussed at pages 27-37 of Petitioner's Brief in *Nowak*. In neither Act is there an expressed requirement of knowledge. But in *Nowak*, as it previously had done in *Schneiderman* (320 U.S. at 154, 158), this Court deemed it essential to the preservation of "freedom of thought" and to forestall guilt by association, to interpret the 1906 Act as requiring "clear, convincing and unequivocal" proof of knowledge on the part of the defendant of the claimed illegal advocacy. Congress, with full awareness of this interpretation, did not change this holding when, in 1940, it extended these belief requirements. The clear implication of *Nowak* therefore, is that knowledge is required under both Acts.*

Indeed, the Government contended in *Nowak* (Gov't Brief, pp. 37-39), as it has consistently contended in recent years, that the amended belief provisions of the 1940 Act merely made explicit what was already implicit in the previous 1906 Act, i.e. that the 1906 Act itself necessarily barred "advocates of violent overthrow"; and therefore Communists, irrespective of their personal knowledge, were barred because mere membership in that Party was incompatible with attachment to the Constitution and good moral character. Thus, the Government viewed the 1940 Act as indistinguishable from the 1906 Act in this

* In the Immigration and Nationality Act of 1952 (8 U.S.C. 1451(a)) Congress expressly wrote in a requirement of proof of knowledge by providing for cancellation only in cases of "concealment" or "wilful misrepresentation."

respect. And in its brief in *Nowak* (pp. 37-39) it argued that the 1940 addition to the belief-qualifications was "an irrelevant factor" since "attachment" had been a part of the naturalization laws since 1903 and was broad enough without more specific enumeration.

The correctness of this theory appears to have been either accepted or assumed by this Court, for purposes of its decision, when it said in *Nowak*:

> "* * * But this proof (of membership without a showing of 'awareness of the illegal aspects of the Party's program (*Nowak*, supra, at p. 666) does not suffice to make out the Government's case, for Congress in the Nationality Act of 1940 did not make membership or holding office in the Communist Party a ground for loss of citizenship (*Nowak*, supra, at p. 668)." (Emphasis supplied.)

In other words, *Nowak* stands for the two basic propositions: First, denaturalization because of fraud, may not be decreed under Sec. 338a of the Nationality Act of 1940 in any case where the claim of fraud is predicated solely upon the failure of the petitioner to disclose his past Communist Party membership in answer to Question 28 on the Preliminary Naturalization form used in the *Nowak* case and in Petitioner's case; and second, denaturalization may not be decreed because of illegal procurement in any case where the claimed lack of attachment is based solely upon proof of mere membership or officership in the Communist Party without (a) showing personal advocacy or (b) proof of illegal advocacy by that organization and the applicant's awareness of such advocacy.

Applying each of these propositions to Petitioner's denaturalization proceeding, it is obvious that he has been

deprived of his citizenship because of an erroneous interpretation and application of the denaturalization law.

5. The opinion of the Trial Court also attempts a distinction from *Nowak* by pointing to one issue raised by the complaint in Petitioner's case but not before the Courts in either *Nowak* or *Maisenberg*. Thus, the opinion refers to the fact that in his 1940 Alien Registration form (Gov. Exh. 3), Petitioner had stated as follows:

> "10. I am, or have been within the past five (5) years, or intend to be engaged in the following activities:
>
> In addition to other information, list memberships or activities in clubs, organizations, or societies . . . (None).
>
> . . . . . .
>
> 15. Within the past five (5) years, I have not been affiliated with or active in (a member of, official of, a worker for), organizations, devoted in whole or in part to influencing or furthering the political activities, public relations or public policy of a foreign government."

And the opinion asserts that Petitioner "failed to tell the truth in either instance."

Whether the Trial Court is suggesting this as an additional support for its finding of fraud, is not clear. But it is not without significance that in its opinion on Petitioner's denaturalization (Tr. 175), the Court made no mention of this Alien Registration form and the sole evidence in the record on this issue is the form itself. It would appear that this claim was abandoned by the Government.

In any event, however, the questions and answers in Petitioner's Alien Registration Form, if relevant and material to the issues presented in his denaturalization case,* must be tested by the same standards of definiteness applied by this Court to the questionnaire in *Nowak*. And tested by these standards it is apparent that the questions and answers in this form do not warrant the Trial Court's conclusions of falsity.

The conclusion follows, therefore, that since Petitioner's case is indistinguishable in fact and in law from the Government's charges and the issues determined in *Nowak*, and since his case was not decided in accordance with the principles of law as clarified by this Court in *Nowak* the judgment of denaturalization against the Petitioner was erroneous.

## II.

### Is the Remedy Provided in Rule 60(b) of the Federal Rules of Civil Procedure Available to This Petitioner?

1. It appears, we think, from the concluding paragraph of the Trial Court's opinion denying Petitioner's motion, that the real basis for the Court's decision was not an adverse exercise of discretion under the Rule; nor a belief that the law was properly applied in Petitioner's denaturalization; but rather, that Rule 60(b) was inapplicable, as a matter of law, to the situation presented here. Particular reliance is placed by the Trial Court on this Court's decision in *Ackermann* v. *United States*, 340 U.S. 193 and the opinion of the Court of Appeals for the Sixth Circuit in *Berryhill* v. *United States*, 199 F. 2d 217 (1952).

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* Appellant's motion to strike from the Complaint in his denaturalization proceeding all references to his Alien Registration as irrelevant and immaterial was denied. (Tr. 28-29)

Rule 60(b) in its pertinent part states:

"Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken * * *."

Clause (6) of this Rule, "for all reasons except the five particularly specified (in the Rule) vests power in Courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott* v. *United States*, 335 U.S. 601 at 615. In this case, both inequity and injustice will flow from the retention and the prospective application of the denaturalization judgment.

In the first place consideration must be given to the nature of a judgment of denaturalization and the consequences it entails. If a denaturalization judgment is annulled, there is no disturbance of property rights, no adverse adjustment of the status quo, no chance of injuring third persons. The Government is not harmed by a reacquisition of citizenship by one who should not have been deprived of it. If anything, the Government, as the body politic, would benefit by the correction of the injustice done one of its citizens.

Denaturalization is "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development." *Trop* v. *Dulles*, 356 U.S. 86, 101. If an erroneous denaturalization judgment is allowed to stand, it may, and in this case will result in deportation to the added injury of the individual and his family. And this is so here because the alleged basis for denaturalization is also the ground for deportation (see, *supra*, p. 10). Petitioner's deportation will be unjust because predicated on an erroneous denaturalization judgment, but it will be unassailable on that account if the denaturalization judgment is not set aside in this proceeding. In the present case, Petitioner has lived in the United States for 44 years, since he was 16 years old. If the erroneous denaturalization judgment is allowed to stand, he will be exiled. It seems incredible that the Government, having inflicted on him the injury of an erroneous cancellation of his citizenship, should be able to utilize the judgment further so as to ruin his life completely.

2. The crux of the Trial Court's decision, affirmed below, is the following:

> "* * * Therefore, since Petitioner abandoned his appeal, as he states, 'because of the controlling decisions' (in *Chomiak*, *Sweet* and *Charnowola*) we have absolutely no alternative but to follow the *Ackerman* decision coupled with the Sixth Circuit Court of Appeals' statement in *Berryhill* v. *United States*, 199 F. 2d 217 (1952) which refutes petitioner's reasoning by saying:
>
> 'It appears to be the settled rule that a change in the judicial view of the applicable law, after a final

judgment, is not a basis for vacating a judgment entered before announcement of the change.' "

*Ackermann* v. *United States*, 340 U.S. 193, denied relief under clause (6) of Rule 60(b), not because the denaturalization judgment was not appealed, but because in the opinion of a majority of this Court the reasons advanced for failing to appeal—financial hardship and reliance upon poor advice from an Immigration Service employee—were deemed insufficient to overcome the view that a free and deliberate election had been made by petitioner not to appeal. Even so Justices Black, Frankfurter and Douglas dissented, observing that the decision "neutralizes the humane spirit of the Rule and thereby frustrates its purpose" (at 202). Justice Clark did not participate.

*Ackermann*, therefore, does not dictate a hard and fast principle to be applied indiscriminately whenever an appeal is not taken or is subsequently withdrawn. Instead, it requires an appraisal of the circumstances in each case; an exercise of discretion. In Petitioner's case the Trial Court declined to exercise any discretion because it believed that *Ackermann* precluded it from doing so. At most, *Ackermann* stands for the proposition that Rule 60(b)(6) may not be invoked to vacate an erroneous judgment, which might have been reversed by appeal but for the fact that the aggrieved party "slept on his rights" and deliberately elected not to appeal in a situation where he was not prevented from doing so and where it could not be said that an appeal would have been hopeless. It certainly does not mean that a failure to appeal, or the dismissal of an appeal by stipulation, prevents the Trial Court from exercising discretion under Rule 60(b). Cf. *McGrath* v. *Potash*, 199 F. 2d 166, discussed herein at page 28.

In the instant case it cannot be said that Petitioner "made a considered choice not to appeal" (*Ackermann*, at p. 198). As pointed out above (pp. 9-11) Petitioner here not only perfected his appeal in the face of the appellate Court's outstanding adverse decisions in *Chomiak*, *Sweet* and *Charnowola*, *supra*, but requested and was granted leave to delay filing his brief pending this Court's action in those three cases.

Reference to the Petitions for Certiorari in these three (3) cases (October Term, 1954, Nos. 73, 74 and 75) will suffice to show that every conceivable issue involved in Petitioner's case was raised and adjudicated adversely by the appellate Court in these three (3) appeals.* Indeed, throughout the trial of Petitioner's case, both the Government and the District Court made frequent references to these three (3) cases as having settled the law of Petitioner's case (Trial Tr. at pp. 350, 384, 425-427, 485, 488, 494 and 498). And not until this Court, by its denial of certiorari in each of these three (3) cases (348 U.S. 817), had indicated an unreadiness to consider the legal arguments which Petitioner's appeal presented, did he finally stipulate for dismissal of his appeal.

Surely, under those circumstances, it cannot be said here, as in *Ackermann* that no justifiable reason is shown for his failure to pursue his remedy by appeal or that his failure to appeal "was a free and deliberate choice."

In *McGrath* v. *Potash*, 199 F. 2d 166, the Government itself was confronted with precisely the same legal question now raised by this Petitioner and successfully pursued the same course of action which it now seeks to deny to this Petitioner. Deportation proceedings had been in-

* *Nowak* and *Maisenberg* followed *United States* v. *Zucca*, 351 U.S. 91, and raised for the first time in this Court the sufficiency of the denaturalization affidavit.

stituted against Potash. He sought an injunction, contending that his deportation hearing was not being conducted in conformity with the Administrative Procedures Act. The District Court granted a permanent injunction and the Government appealed. While the appeal was pending, the same issue was decided by this Court in another case and its decision was in accord with the District Court's decision in the *Potash* case. Accordingly, the Government's appeal in the *Potash* case was dismissed by stipulation. Later, Congress amended the law so as to make the Administrative Procedures Act inapplicable to deportation hearings. The Government then moved under Rule 60(b)(6) to vacate the above-mentioned final judgment. The District Court denied the motion and the Court of Appeals reversed, holding that the subsequent change in the applicable law removed the basis for giving any prospective effect to the prior judgment.

*Berryhill* v. *United States*, 199 F. 2d 217 (C.A. 6, 1952) relied upon by the District Court is clearly distinguishable on its facts. Conflicting claims against the Veterans Administration for the proceeds of a National Service insurance policy had been judicially determined adversely to the plaintiff, a foster sister of the deceased. Later, and upon the strength of a subsequent decision in this Court (*Woodward* v. *U.S.*, 341 U.S. 112, 71 S. Ct. 605) holding a foster sister to be an eligible beneficiary and resolving a conflict which existed on this question in the Third and the Eighth Courts of Appeal, plaintiff sought by motion to set aside the previous judgment, thus compelling the Veterans Administration to pay the claim twice. The Court of Appeals for the Sixth Circuit affirmed the denial of plaintiff's motion for the reason that—

> "We are of the opinion that the judgment in this case was not 'based' upon a prior judgment which has been reversed or otherwise vacated within the mean-

ing of Sub-section 5 of Rule 60(b). The ruling of the Court of Appeals for the 8th Circuit in *Woodward* v. *U.S.*, supra, was not controlling upon the District Judge, sitting in a different Circuit and the record does not show that the District Judge 'based' his ruling upon the decision in that case."

The Court also concluded that plaintiff's motion "states no reason for not taking an appeal" and the failure to appeal "was a free and deliberate choice." It was in this context—involving a hardship to the Government and the intervention of rights of a third party—that the Court made the observation quoted by the Trial Court here. The issue presented by the plaintiff's claim had never been determined in the Sixth Circuit; hence, it hardly could be said that there had been "a change in the judicial view of the applicable law."

Parenthetically, it is observed here that the minimum relief which Petitioner seeks is not necessarily a vacation of the denaturalization judgment; but rather relief from the prospective application and future operation of that judgment. In this respect Petitioner's case is peculiarly dissimilar from *Berryhill* and other cases in which relief from a money judgment is sought under Rule 60(b)* and is more in accord with the historical purpose that Rule was intended to achieve. See Moore's Fed. Prac., 2 ed., Vol. 7, pages 283-303.

But there is a more basic reason why the above quotation from *Berryhill* cannot be accepted as an unvarying rule to be applied to all final judgments regardless of its

* Cf. *Block* v. *Thousand Friend, et al.*, 170 F. 2d 428, where the Second Circuit held that relief from a money judgment should be granted under the Rule notwithstanding no appeal had been taken, where the District Court had approved the local O.P.A. order for repayment of rent and subsequently the Washington Office of O.P.A. had overruled the local office.

consequences in a particular case. This reason finds expression, not only in what this Court recently said in *United States* v. *Ohio Power Co.*, 353 U.S. 98, 77 S. Ct. 652 (1958), but in what the Court did. That case involved a suit by the power company to recover taxes paid under protest. The Court of Claims allowed recovery and the Government's petition for certiorari was denied. Thereafter, two (2) petitions for rehearing also were denied by this Court. Meanwhile, the Court of Claims reiterated its holding in a second similar case and more than one (1) year later, a different result was reached by the Court of Appeals for the Second Circuit in another similar case. This Court granted certiorari in both of these two latter cases and, at the same time, *sua sponte*, set aside its six (6) months old denial of rehearing in the *Ohio Power* case in order that the case "might be disposed of consistently with the companion cases" in which certiorari was granted.

In "the companion cases" the Government's position was sustained; and this Court thereupon reconsidered the Government's second petition for rehearing in the *Ohio Power* case, vacated the order denying certiorari, granted the petition for certiorari, and reversed the judgment below which had been adverse to the Government's contention. All of this was accomplished by the Court without benefit of a Rule 60(b). The justification given by the Court has peculiar application to this Petitioner:

> "We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the application of our rules. This policy finds expression in the manner in which we have exercised our power over our own judgments, both in civil and criminal cases."

Among the cases cited by the Court as reflecting this policy, was *Remmer* v. *United States*, 348 U.S. 901, where,

following denial of review by this Court, a different result was reached by the Court in later companion cases involving the same issues. This Court then granted a delayed petition for rehearing in *Remmer*, restored the case to the docket and then remanded it to the Court of Appeals "in order that the Court on the whole record may reconsider the case in the light of our recent decisions * * * ."

At a minimum, the same disposition made by this Court in *Ohio Power* should be made by this Court on behalf of this Petitioner.

Finally, mention should be made of *Title* v. *United States* (C.A. 9th, decided January 6, 1959, cert. den. June 15, 1959). The Petitioner there sought relief by motion under Rule 60(b) from a judgment of denaturalization. The Complaint filed by the Government in the denaturalization proceeding on October 21, 1954 did not include the affidavit of good cause, but Title's motion to dismiss the complaint for this reason, was denied by the District Court and on July 14, 1955, judgment of denaturalization was entered. *Title* filed an appeal, on September 8, 1955, which was later dismissed by the Court of Appeals on February 27, 1956 "for failure of appellant to prosecute the appeal."

Meanwhile, on October 10, 1955, and before *Title's* appeal had been dismissed, this Court granted certiorari in *United States* v. *Zucca*, 350 U.S. 817, and on April 30, 1956, about two months after dismissal of *Title's* appeal, this Court decided in *United States* v. *Zucca*, 351 U.S. 91, that the affidavit of good cause "must be filed with the complaint when the (denaturalization) proceedings are instituted. Two years later, in the *Matles, Lucchese* and *Costello* cases (356 U.S. 256), this holding was reiterated.

It was not until two years after the issue had been determined in *Zucca* and on May 22, 1958, that Title moved

to set aside and vacate his denaturalization judgment "on the ground that the judgment was void in that the required affidavit showing good cause was never filed and that it was no longer equitable that the judgment should have prospective application." The order denying his motion was affirmed, the Court of Appeals saying:

> "* * * Were Title's appeal presently before us, we would reverse the judgment of denaturalization rendered against him by the District Court. But that appeal he has voluntarily failed to prosecute. He is in the same status as any other individual who fails to protect fully his valid legal rights, by neglecting to perfect his appeal.
>
> * * * * * * *
>
> "* * * Rule 60(b) was not intended to provide relief for error on the part of the Court or to afford a substitute for appeal." (Citing *Ackermann* and *Berryhill*, *supra*.)

This Court's denial of certiorari in *Title* is not in conflict with Petitioner's position here. The pertinent difference between the two, for purposes of Rule 60(b) relief, is that in *Title* (as in *Ackermann* and *Berryhill*, *supra*) the Petitioner, in a situation where he was not prevented from doing so and where it could not be said that an appeal would have been hopeless, nevertheless, made a free and deliberate choice not to perfect his appeal. *Zucca* was pending in this Court at the very time *Title's* appeal was pending in the Court of Appeals. But unlike the Petitioner here, *Title* neglected to preserve his appeal pending the outcome in Zucca. Moreover, he neglected to move within a reasonable time after Zucca was decided in this Court, and the record disclosed no reason for his neglect.

## Conclusion

The judgment below should be reversed

Respectfully submitted,

GOODMAN, CROCKETT, EDEN & ROBB

By GEORGE W. CROCKETT, JR.

*Attorneys for Petitioner*
*3220 Cadillac Tower*
*Detroit 26, Michigan*
*Woodward 3-6268*

Dated: August 5, 1960
Detroit, Michigan